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No. 908

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

BERNHARD ROSEE,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and as a co-partnership, d.b.a. BAGGOT and MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER; MARTIN H. MILEK; ROY C. LOFTUS; RICHARD ROSE; RAYMOND COMENZO and THOMAS H. HERR, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINION BELOW.

The Court of Appeals' Opinion is dated January 2, 1963. Petition for rehearing was denied January 21, 1963. The Opinion is not yet reported. It is quoted in full in the Appendix.

JURISDICTION.

Jurisdiction is invoked under Section 1253, Chapter 24, U.S. Code.

QUESTIONS PRESENTED.

1. May a state grant judicial power to a corporation free of any standard of conduct governing due process?

2. Where a state grants a charter to a corporation through which the corporation exercises judicial power and in the exercise of such power the rudiments of fair play are ignored and where the State Courts habitually refuse judicial review, may the party aggrieved seek relief in the Federal Courts?

3. Is the public purpose of the Commodity Exchange Act affected by matters which relate to arbitrary conduct of the Board of Trade of the City of Chicago?

STATEMENT.

Bernhard Rosee, a member of the Board of Trade of the City of Chicago, filed suit in the District Court for the Northern District of Illinois asking relief from oppressive conduct of the Arbitration Committee of the Board under the 14th Amendment, Civil Rights Statutes, and the Commodity Exchange Act, 7 U.S.C. 1-17.

In general, the complaint set forth the delegation of judicial power by the State of Illinois to the Board of Trade, free of any restraint or requirement of due process and the exercise of that power in derogation of Rosee's property rights.

In reply to a motion to dismiss filed in the District Court, Plaintiff submitted authority in support of his assertion that he could not obtain relief in the State Courts.

The District Court granted the motion to dismiss on the ground that the complaint failed to establish federal jurisdiction, and on appeal the Court of Appeals affirmed.

The complaint of Rosee alleged:

1. His membership in the Board of Trade was his only source of income and he had been deprived of it wrongfully.

2. He had been publicly critical of activities of the officials of the Board of Trade and had testified before legislative committees in this regard; he had been harassed as a result.

3. A spurious claim had been presented against him by Baggott & Morrison, other members of the Board of Trade, through whom he had cleared his accounts.

4. He denied the claim.

5. He was given no choice by the Board of Trade; he was obliged to arbitrate or be suspended.

6. A hearing took place before the Committee of Arbitration of the Board of Trade which included the following experiences:

(a) The Committee allowed Baggot & Morrison to have counsel, a member of the Board of Directors of the Board of Trade. Rosee was refused right of counsel.

(b) The Committee refused to require production of records of account.

(c) The Committee allowed the attorney for Baggott & Morrison to act as chairman, examiner, and permitted him to direct some of the proceedings to Rosee's confusion and detriment.

(d) The Committee refused Rosee the right to present a counterclaim.

(e) The Committee refused to hear evidence of violations of the Commodity Exchange Act of Baggott & Morrison in the transaction.

(f) The Committee received evidence out of Rosee's presence.

(g) Two members of the Committee informed Rosee that they were voting against him prior to the occasion for presentation of Rosee's defense.

(h) The officers and directors of the Board of Trade improperly influenced the Committee.

7. Rosee alleged that he had asked the Commodity Exchange Authority to help him in his effort to procure the right to counsel and that his request was declined.

The petitioner, Rosee, is an individual in his late sixties.

PERTINENT STATUTES.

I. Commodity Exchange Act, As Amended, 7 U.S.C. 1-17a

"SEC. 5a. Each contract market shall—

"(1) promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

• • •

"SEC. 5b. The failure or refusal of any board of trade to comply with any of the provisions of this Act, or any of the rules and regulations of the Secretary of Agriculture thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a

"contract market" in accordance with the procedure and subject to the judicial review provided in paragraph (a) of section 6 of this Act.

"SEC. 6. Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the above conditions, and with a sufficient assurance that it will continue to comply with the above requirements.

* * *

"(b) If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of this Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or it attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade, he may serve upon such person a complaint stating his charges in that respect, to which complaint shall be attached or contained therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made directing that all contract markets until further notice of the Secretary of Agriculture refuse all trading privileges to such person, and to show cause why the registration of such person, if registered as future commission merchant or as floor broker hereunder should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. For the purpose of securing effective enforcement of the provisions of this Act, and for the purpose of any investigation or proceeding under this Act, the pro-

visions, including penalties, of the Interstate Commerce Act, as amended and supplemented (49 U.S.C. 12, 46, 47, 48), relating to the attendance and testimony of witnesses, the production of documentary evidence, and the immunity of witnesses, are made applicable to the power, jurisdiction, and authority of the Secretary of Agriculture (or any person designated by him), the commission, and any referee designated pursuant to the provisions of this Act, and to any person subject thereto. Upon evidence received, the Secretary of Agriculture may require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith served upon the Secretary of Agriculture by delivering such copy to him, and thereupon the Secretary of Agriculture shall forthwith certify and file in the court a transcript of the record theretofore made, including evidence received. Upon the filing of the transcript the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

* * *

"SEC. 8a. The Secretary of Agriculture is authorized—

• • •

"(6) to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 8 of this Act, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers."

II. Private Laws, Illinois, 1859, pp. 13-15, and Rules, Board of Trade, pursuant thereto

"SECTION 1. That the persons now composing the Board of Trade of the City of Chicago are hereby created a body politic and corporate, under the name and style of the 'Board of Trade of The City of Chicago,' and by that name may sue and be sued, implead and be impleaded, purchase, take, receive, acquire, own, hold, use, lease, sell, mortgage, pledge and otherwise deal in and with such real or personal property, including shares or other interests in or obligations of domestic or foreign corporations, associations, partnerships or individuals, or whatever nature or kind and of whatever amount or value may be necessary, suitable or proper to serve and accomplish the purposes of its organization; have a common seal, and alter the same from time to time; and make such Rules, Regulations, and By-Laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land.

• • •

"SECTION 4. The said corporation is hereby authorized to establish such Rules, Regulations, and By-Laws for the management of their business, and the mode in which it shall be transacted, as they may think proper.

• • •

"SECTION 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the Rules, Regulations, and By-Laws thereof.

"SECTION 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of Appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute.

"SECTION 8. When any submission shall have been made in writing and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-Laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court."

Pursuant to the foregoing Act, the Board of Trade adopted the following Rules:

"130. Suspension for Default.—Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied. Registered firms and corporations shall be deemed members under this Rule. If the member alleged to be

in default denies the default, he shall be entitled to have the claim arbitrated. If the claim is admitted or established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. Application for reinstatement shall allege, under oath, that all such debts have been discharged, and notice of such application shall be posted on the bulletin board fifteen days prior to the hearing of such application.

* * *

"160. Professional Counsel Excluded.—No member of the Association shall have a right to be represented by professional counsel in any investigation or hearing before the Board or any Standing or Special Committee.

* * *

"185. Oath of Arbitrators.—Before taking office, the members of both Committees shall be sworn faithfully and fairly to hear, examine, and determine all controversies according to the principles of equity and justice and to make just and true awards according to the best of their understanding. Such oath may be administered by any person authorized to administer oaths.

"186. Conduct of Trial.—The Committee of Arbitration shall hear all evidence submitted by the parties relative to such controversy, which evidence shall be taken under oath or affirmation and shall be duly recorded. The member resisting the claim may make any defenses before the Committee which would be available to him in a court of law or equity.

"187. Award of Committee of Arbitration.—After such hearing, the Committee of Arbitration shall file its award in writing with the Secretary, who shall deliver copies thereof to all interested parties. Such award shall be rendered according to the facts disclosed by the evidence and according to the Rules and Regulations of the Association and the laws of the land."

REASONS FOR GRANTING THE WRIT.

I.

LACK OF DUE PROCESS AS A BASIS FOR THE EXERCISE OF CERTIORARI.

Can a state grant judicial power to a corporation and provide neither standards for the exercise of that power nor opportunity for judicial review where abuse of the power is charged?

In the first place, it is somewhat doubtful that a state can invest a private corporation with unbridled authority to make awards which have the force of judgments and upon which execution may issue.

It is certainly a fatal defect if no standards at all are set to guide private action. *Coty, Inc.* v. *Hearn Department Stores, Inc.*, 158 Misc. 516, 284 N.Y. Supp. 909 (Sup. Ct. 1935). A municipal ordinance conferring upon adjacent property owners unfettered discretion to determine the use of another's property may constitute denial of due process. *Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 49 Sup. Ct. 50, 73 L.Ed. 210 (1928); *Eubank* v. *Richmond*, 226 U.S. 137, 33 Sup. Ct. 76, 57 L.Ed. 156 (1912); *cf. Cusack Co.* v. *Chicago*, 242 U.S. 526, 37 Sup. Ct. 190, 61 L.Ed. 472 (1917), and a statute enabling miners and operators to fix hours of work with no provision for impartial review is void since it enables a selfish majority to discriminate against an unwilling minority. *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 56 Sup. Ct. 855, 80 L.Ed. 1160 (1936).

In the case of the Board of Trade, the only appeal provided for is in the Board itself—its individuals ap-

pointed by the same officers—unregulated by any standards of fair conduct, and unsupervised by a disinterested tribunal.

For over half a century, the Supreme Court of Illinois in an unbroken line of decisions has refused to interfere with the awards leading to membership suspension of the Committees of the Board of Trade for any reason whatsoever, either in equity or at law. *Board of Trade* v. *Nelson*, 162 Ill. 431, 439; 44 N.E. 743, 745; *Fisher* v. *Board of Trade*, 80 Ill. 85, 87; *Bostedo* v. *Board of Trade*, 227 Ill. 90, 91, 81 N.E. 42, 43; *People ex rel. Page* v. *Board of Trade*, 45 Ill. 112, 116, 118; *People* v. *Board of Trade*, 80 Ill. 134, 137; *Baxter* v. *Board of Trade*, 83 Ill. 146, 149; *Sturges* v. *Board of Trade*, 86 Ill. 441, 442; *Pitcher* v. *Board of Trade*, 121 Ill. 412, 419, 421; 13 N.E. 187, 188, 189; *Pacaud* v. *White*, 218 Ill. 138, 147, 148; 75 N.E. 779, 781, 782.

The reasoning is that by becoming a member, that person had voluntarily submitted himself to the operation of the Special Legislative Act and the rules adopted pursuant thereto; that he had thereby made a valid and binding agreement to submit questions in dispute connected with his membership to arbitration, which the courts were powerless to interfere with; and that the Board of Trade having been empowered by its charter to act judicially, its sentence concluded the matter and foreclosed review by any other judicial tribunal.

It has even been held that if the member had no notice of the hearing and had been unjustly suspended, a court of equity could not reinstate him, because the action of the Board is final and complete, and if it has erred in that action either on the merits or has acted in a case without justification, chancery cannot afford a remedy." *Fisher* v. *Board of Trade*, 80 Ill. 85, 87.

The Court of Appeals below suggested that in order to invoke federal jurisdiction, the Petitioner was obliged to pursue his remedies through the State Courts. Good judicial administration discourages futile procedures. *Wade* v. *Mayo*, 334 U.S. 672, 681.

II.

DENIAL OF EQUAL PROTECTION AS A BASIS FOR EXERCISE OF CERTIORARI.

The Illinois decisions not only deny due process; they deny equal protection of the laws. Section 8 of the Legislative Act incorporating the Chicago Board of Trade permits the filing of the award in the Circuit Court with all the force and effect of a judgment and authorizes the issuance of an execution thereon. The alleged debtor's assets are subject to sale; but the Illinois decisions deny him access to the same court to resist, even though his constitutional guaranties have been sacrificed in the process. (Compare Uniform Arbitration Act, 1 Ill. Rev. Stat. 1961, Ch. 10, Secs. 105-115.)

The rule making and judicial authority of the Board of Trade derives from a special act of the legislature and not from the general laws of Illinois.

A dramatic contrast can be found in the general laws, which regulate the marketing of perishable agricultural commodities. (Ill. Rev. Stats. Chap. 5, Sec. 139.)

In administrative hearings under this law (Sec. 150), an award of damages must be taken to a circuit or superior court in order that a judgment be rendered, and in such suits the court must proceed in all respects as in the usual suits for damages. Review is provided under the Administrative Review Act (Sec. 151a).

In Illinois administrative agencies are subject to rules of the Supreme Court of Illinois. (Ill. RS #266, Chap. 110.) The Civil Practice Act, which imposes the conventional requirements of judicial procedure, applies to such proceedings (Sec. 277).

In contrast, the Board of Trade is a power unto itself. When one considers that the members who sit in judgment on others are themselves competitors in the pits and they are not by law obliged to follow conventional standards of fair conduct, such license makes equal protection of the law a doubtful result.

Are the actions of the Board of Trade "state action" within the meaning of the 14th Amendment?

When private individuals or groups are endowed by the state with power and functions governmental in nature, they become instruments of the state and subject to the same constitutional limitations as the state itself. *Baldwin* v. *Morgan*, 287 Fed. 2d 750, 755. The Court of Appeals below stated that the proceedings of which the Petitioner complained were different from activities previously determined to constitute action under color of state law. This ignores the variety of the forms in which the law has been applied against discriminatory action.

The requirements of due process are not exclusively the reserve of Negroes, political heretics and tortured signers of confessions. The right to earn a living is a most precious one. Membership in the Board of Trade itself has been acknowledged to be a valuable property right. *Weaver* v. *Fisher*, 110 Ill. 146; *Jones* v. *Fisher*, 116 Ill. 68. Whether the arbitration was voluntary, as the Court of Appeals believed, or compelled, as the complaint asserted, there was a singular lack of fairness in the proceedings of the Board. The petitioner has been deprived of

a valuable right; he has been shamed and deprived by a group exercising authority conferred by the legislature of Illinois.

"Only by sifting facts and weighing circumstances can the now obvious involvement of the state in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722.

In *Pollak* v. *Public Utilities Commission*, 191 Fed. 2d 450, it was held that a rider on a privately owned public transportation system could obtain relief from being forced to listen to music while riding. One of the important considerations was that the firm had been given a "virtual monopoly."

The Board of Trade monopoly is not virtual—it is complete!

Where enterprises conceived as private property have been so used that they become affected with the public interest, the constitutional rights of persons may not be abridged through their use. In *Garner* v. *Louisiana*, 368 U.S. 157, 183, this Court described restaurants as having "a public consequence."

The status, influence, and function of each member of the Board of Trade was considered of sufficient "public consequence" to warrant provision in the Commodity Exchange Act respecting his suspension at the instance of the Commodity Exchange Authority.

In the instant case, Rosee appealed to the local Commodity Exchange Authority for aid when the Board of Trade refused him due process. When denied the right to employ counsel, he informed the Commodity Exchange Authority. No interest was inspired; no inquiry made; no help was extended.

Thus, the Authority confirmed by its behavior the view held in Illinois that a large area of jurisdiction remains "private" in the administration of the national exchanges, though injustice may result.

> "To suggest that a 'negative' order cannot be the final step in a misuse of government power is to assert a distinction the Supreme Court has repudiated. * * * An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status." *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 142, 59 S.Ct. 754, 763, 83 L.Ed. 1147. *Mitchell* v. *United States*, 313 U.S. 80, 92, 61 S.Ct. 873, 85 L.Ed. 1201; *Henderson* v. *United States*, 339 U.S. 816, 70 S.Ct. 843, 94 L.Ed. 1302. Even failure to enter any order may be a denial of constitutional rights." *Pollak* v. *Public Utilities Commission*, 491 F.2d 450, 455.

There is a need to define the area of public interest implicit in the Commodity Exchange Act.

The National Exchanges, whether supervised by the Commodity Exchange Act or the Securities Act, are invested with power that is far reaching and pervasive. If that power is abused, there must be an opportunity for judicial review. Even where the statute is silent on the question of judicial review, this is not decisive. *Estep* v. *United States*, 327 U.S. 114, 120, 66 S.Ct. 423.

This Court now has pending before it a case involving arbitrary action by the New York Stock Exchange (*Silver* v. *New York Stock Exchange*—*certiorari* from the Court of Appeals of the Second Circuit, 302 Fed. 2d 714 (#150 current term.)). One of the important elements in the case was the holding of the Court of Appeals

that, even where jurisdiction might not be available under the Sherman Act, arbitrary action by the Exchange was not without remedy. While not applicable in terms of jurisdiction, the public consequence of administrative acts seems unquestioned. Certainly, these are not described as the private matter of a corporation.

In its construction of the Commodity Exchange Act, the Court of Appeals below unduly restricted the concept of "federally created rights and duties." The general purpose of the Commodity Exchange Act was to remove burdens on interstate commerce, caused by manipulation, market controls and the abuse stemming from a concentration of economic power. *Board of Trade* v. *Olsen*, 262 U.S. 1. Throughout its history, and it has been much in the courts, the Board of Trade of the City of Chicago has argued that it is a mere private corporation and that its business, in its own words, is "essentially private." *Stock Exchange* v. *Board of Trade*, 127 Ill. 153, 161, 163. In that case, an early Illinois court was constrained to say:

> "For many years the board has so used its franchises, and its members have so conducted their business, as that it has become of vast commercial influence, and fixes the market values of grain and agricultural products for a large territory, and the fluctuations in prices upon its floors powerfully affect the market prices of the necessaries of life throughout the country and the world. The great power and influence which the board possesses in dictating market values, are owing to the vast aggregation of products which are drawn to its portals for a market, and are bought and sold upon its floors, and which pay tribute and toll, in the shape of commissions, to its members. *The great bulk of this business,—though in form, and as between the members, the mere private and individual dealings of such mem-*

> ***bers,—is in reality the business of the numerous producers, consumers, merchants and shippers for and on behalf of whom these members deal.*** (Emphasis added.)

In the case of *Munn* v. *People of Illinois*, 94 U.S. 113, this Court recognized and followed the doctrine that when private property is devoted to a public use, and becomes affected with a public interest, it ceases to be *juris privati* only, and is subject to public regulation.

A factor in the influence of the Board is the integrity of its administration. This has been recognized by the Court of Appeals of the Seventh Circuit.

> "In the promulgation of its regulations, the Board acted in the conduct of the prudential affairs of the Board as any corporation would act in determining corporate policy. Because of the Board's relation to the public, it must, as we have said before, act with the utmost objectivity, impartiality, honesty, and good faith. It owes that duty not only because it is affected with the public interest, but because of the complete confidence reposed in it by its members, and the further fact that the directors, governors, and officers of the Board and Clearing may themselves be members of the market, and as such have to act where their own private interests are concerned. * * * The limitations of its power is to be found in its utmost *bona fides* of action under the rules, by-laws and regulations." *Daniel* v. *Board of Trade of Chicago* (CA7), 164 Fed. 2d 815, 819, 820.

The Chicago Board of Trade cannot conduct its business without authorization from the Secretary of Agriculture. *Board of Trade* v. *Olsen, supra.* Its regulations and by-laws must be filed with the Secretary of Agriculture (Sec. 5a(1)).

The alleged matters which the Arbitration Committee refused to consider as a part of the Petitioner's defense and counterclaim were frauds within the meaning of Section 6(b) of the Commodity Exchange Act.

There is authority in the Act to suspend members and to suspend the Board itself (Secs. 5b; 6(a), 6(b), Commodity Exchange Act, as amended), which authority is exercisable by the Commodity Exchange Authority.

Even in affairs described as "internal", the national exchanges are not instruments of private power and concern. They behave and are treated much like public utilities. The fair administration of the Board of Trade of Chicago is a matter of public concern, whether the question arises on the initiative of the Commodity Exchange Authority or at the insistence of an aggrieved party who cannot obtain relief in the state courts.

The courts of Illinois have made the Board of Trade an island. The Commodity Exchange Authority considers some of its affairs "off limits". Only the action of this Court will bring the Board of Trade back into the legal province of the United States.

Respectfully submitted,

BERNARD H. SOKOL,
Counsel for Petitioner

APPENDIX.

In the
United States Court of Appeals
For the Seventh Circuit

No. 13857 September Term and Session, 1962

Bernard Rosee,
Plaintiff-Appellant,
v.
The Board of Trade of the City of Chicago, a corporation; James E. Baggot, Jr., and Donald W. Morrison, individually and as a co-partnership, d.b.a. Baggot and Morrison; Harris Haywood; Sidney C. Hamper; Martin H. Milek; Roy C. Loftus; Richard Rose; Raymond Comenzo and Thomas H. Herr, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and Warren W. Lebeck, individually and as Secretary of the Board of Trade of the City of Chicago,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 2, 1963

Before Schnackenberg and Castle, Circuit Judges, and Grubb, District Judge.

Grubb, District Judge. This is an appeal from an order of the district court dismissing the amended complaint herein for want of jurisdiction under the Civil Rights Statutes, 28 U. S. C. A., Section 1343, and 42 U. S. C. A., Section 1983, and the Commodity Exchange Act, 7 U. S. C. A., Sections 1 to 17.

Appellant, Bernard Rosee, a trader member of the Chicago Board of Trade, cleared his transactions through the firm of Baggot and Morrison. In June 1960, Rosee and Baggot and Morrison disputed the status of Rosee's account, and a claim against Rosee for $13,654.41 was received by the Board of Directors. At Rosee's request, the dispute went to the Arbitration Committee of the Board which rendered an award against Rosee who then appealed to the Board's Committee of Appeals. This committee affirmed the award. Rosee refused to abide thereby and was suspended from membership pursuant to the rules of the Board.

Rosee then filed suit in the Superior Court of Cook County, seeking reinstatement to membership in the Board. After denial of a request for a temporary mandatory injunction compelling his reinstatement, Rosee took a voluntary nonsuit in the state action and thereafter commenced the instant case. He alleges, as he did in the state action, that he was denied a fair hearing in the Board proceedings which ultimately resulted in the suspension of his membership. On motion of the defendants-appellees, the district court held that the amended complaint did not plead sufficient facts to establish federal jurisdiction.

Rosee contends that he has been deprived of a valuable property, membership in the Board of Trade, without due process of law, and that he has been denied the equal protection of the laws. The acts complained of—the allegedly arbitrary and discriminatory proceedings before the Board—are claimed to have been performed under color of state law in that the Board actions were pursuant to legislation providing for the incorporation of the

Board and for authorization of said Board to make rules and regulations for its government. Additional state action allegedly infringing Rosee's constitutional rights is claimed to lie in the past refusal of the courts of Illinois in other cases to review the validity of proceedings conducted pursuant to the rules of the Board resulting in suspension of membership.

Although incorporated under a special act of the Illinois legislature in 1859, the Chicago Board of Trade is a voluntary association of individuals endowed with the ordinary powers and privileges of a private corporation. *Thomson* v. *Thomson*, 293 Ill. 584 (1920), 127 N. E. 882, 273 U. S. 638, dismissing writ of error to the Illinois Supreme Court.

Pursuant to its legislative charter, the Board is authorized to make rules and regulations proper and necessary for its government and the management of its business. The corporation is further empowered to admit to or to expel from membership such persons as it sees fit, in the manner to be prescribed by its rules, regulations, and by-laws. It may constitute and appoint committees of reference and arbitration for the settlement of such disputes as are voluntarily submitted by its members.

The Board proceedings involving Rosee are founded on the agreement of the parties as members of the Board to exercise the right of voluntary submission of a dispute to arbitration. In the performance of the proceedings pursuant to legislative grant and its own rules, the Board was not authorized, nor did it in fact exercise a governmental or public function. It acted in the affairs of its own government and internal business as a private corporation and exercised "the inherent and implied power which is a necessary and inseparable incident of its existence." *Thomson* v. *Thomson*, *supra*, at 590.

The nature of the proceedings affecting Rosee's account and membership status differs from the activities which have been determined to constitute state action

or action under color of state law. In *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (1930), the activities of a state tax commission were in issue; in *Barsky* v. *Board of Regents,* 347 U. S. 442 (1954), those of a state teacher licensing board. *Truax* v. *Raich,* 239 U. S. 33 (1915), involved threatened enforcement by state officers of an allegedly unconstitutional state law. *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), and *Barrows* v. *Jackson,* 346 U. S. 249 (1953), were concerned with enforcement of infringement of constitutional rights by state judicial systems.

Actions arising under the Railway Labor Act, 45 U. S. C. A., Section 153, must be distinguished. Unlike the instant action, these cases are not concerned with rights arising under private agreements. These actions involve the determination of federally created contractual rights as between common carriers and their employees. The federal courts have jurisdiction under proper circumstances to review the validity of the determinations of these rights by agencies created pursuant to federal legislative mandate, whose proceedings thereby partake of a "public" character. *Edwards* v. *Capital Airlines, Inc.,* 176 F. 2d 755, 760 (D. C. Cir. 1949), cert. denied 338 U. S. 885; *Arnold* v. *United Air Lines, Inc.,* 296 F. 2d 191 (7th Cir. 1961).

Considerations as to the governmental or private character of conduct allegedly infringing the complainant's constitutional rights are stated in *Baldwin* v. *Morgan,* 287 F. 2d 750 (5th Cir. 1961), a railway terminal segregation case. The challenged activity was by a terminal, pursuant to state law and state public service commission order. In determining the liability of the terminal, the court notes that it is a public utility, doing something the state deems useful for the public necessity or convenience. The court continues at page 755:

> "* * * When in the execution of that public function it is the instrument by which state policy is to be, and is, effectuated, activity which might otherwise be deemed private may become state action within the Fourteenth Amendment. And whether it is

state policy is to be determined by the nature of the activity in terms of the governmental nature of the function • • •."

The activities of the Board of Trade, in light of the definition set forth in *Baldwin* v. *Morgan, supra,* do not fall within the category of governmental action. The Board is not a public utility; it has not been established that the Board performs something which the state deems useful for the public necessity or convenience in the settlement of disputes between its members and in diciplinary actions concerning its membership. These activities, pursued in accordance with its rules and regulations, are private in nature. The claimed invalidity does not pose a question of infringement of constitutional rights cognizable in the first instance by the federal courts.

Further it is claimed that there is state action infringing Rosee's constitutional rights in the refusal of the courts of the State of Illinois to review Board of Trade proceedings involving disciplinary actions of its members. It has been stated in *Board of Trade of City of Chicago* v. *Nelson,* 162 Ill. 431, 440 (1896), 44 N. E. 743, 746, that the court will not review the facts of proceedings had upon due notice and inquiry, and "there is no question of jurisdiction or legality of proceedings" in which a member "stands convicted by the sentence of a tribunal of his own choice." No case has been cited or found in which an Illinois court reviewed proceedings before the Board of Trade resulting in suspension of membership.

The policy of the Illinois courts with respect to review of Board of Trade disciplinary proceedings, whether it be an absolute refusal to review as claimed by Rosee or whether it is based on the considerations as stated in *Board of Trade of City of Chicago* v. *Nelson, supra,* does not constitute state action resulting in denial of due process or the equal protection of the laws to Rosee. Rosee commenced a state action on substantially similar

allegations as those found in the complaint herein. After denial of his request for a preliminary injunction, he voluntarily dismissed the state case and turned to the federal court. Neither the adjudication in the Superior Court of Cook County nor prior adjudications involving the rights of other persons present a final adjudication of Rosee's rights by a state court. Unless or until an arm of the state, such as the state judiciary, becomes implicated directly in the alleged abridgement of Rosee's constitutional rights, no federal question is presented. See the comment in the dissenting opinion in *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956), at 302, to the effect that implication of the state courts by affirmance of allegedly discriminatory contracts involves governmental action controlled by the Constitution of the United States, thereby presenting a federal question as in *Shelley* v. *Kraemer*, 334 U. S. 1 (1948), and *Barrows* v. *Jackson*, 346 U. S. 249 (1953).

The case of *Doud* v. *Hodge*, 350 U. S. 485 (1956), is not applicable here. There it was held that a three-judge district court had jurisdiction under Title 28 U. S. C. A., Sections 1331, 2281, and 2284, to enjoin enforcement by state officials of an allegedly unconstitutional state statute even though the state courts had not yet rendered a definitive decision as to the meaning or federal constitutionality of the statute. The case is concerned not with the basic question of jurisdiction but with the propriety of passing on the constitutionality of the state statute.

The court concurs in the opinion of the learned district judge that "Plaintiff's complaint relates at best only incidentally to the Commodity Exchange Act." It may be noted that the Board of Trade is subject to federal regulation under the Act because transactions on such boards are involved in interstate commerce and are affected with a national interest. The Act proscribes certain practices by members of a board or contract market and provides the sanction of criminal penalties. The statute does not expressly provide for civil enforcement of any correlative rights corresponding to the statutory duties.

The general purpose of the Commodity Exchange Act was to remove burdens on interstate commerce caused by manipulation and market controls. *Board of Trade of Kansas City* v. *Milligan*, 90 F. 2d 855 (8th Cir. 1937), cert. denied 302 U. S. 710. The proscription of fraudulent contracts creates public rights, as is manifested by criminal sanctions provided by the statute. In this respect the Act may be deemed to differ from the Railway Labor Act which is primarily concerned with the amicable disposition of labor disputes between a carrier and its employees for the ultimate purpose of avoidance of stoppages of interstate commerce. This statute creates duties and rights, among them the freedom of choice in the selection of representatives for the respective parties. The Supreme Court held this duty to be enforceable without a specific statutory provision for a judicial remedy. *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railway & Steamship Clerks*, 281 U. S. 548 (1930), where the party for whose benefits the rights had been created sought to enforce them. A similar decision was reached in *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33 (1916), involving the federal Safety Appliance Act, and *Leedom* v. *Kyne*, 358 U. S. 184 (1958), concerning rights under the National Labor Relations Act in respect to *ultra vires* action of the Board for which no express statutory remedy was provided. In each of these cases, the issue involved enforcement of federally created rights and duties directly related to the purposes of the legislation. Judicial enforcement, although not expressly provided for, was deemed to be necessary for the implementation of the legislative intent in enactment of the statute. In the instant case, it does not appear that Congress contemplated the judicial remedies of injunction and accounting by means of review of arbitration and disciplinary proceedings involving fellow members before the Board as a means of implementing the legislative purpose of the Commodity Exchange Act in proscribing misleading and fraudulent trade transactions.

Appellant has failed to establish that there has been infringement of his constitutional rights by state action or under color of state law, or that the Commodity Exchange Act provides a civil remedy for review of arbitration and disciplinary proceedings by the Board of Trade. For these reasons, it is the conclusion of the court that Rosee has not pleaded sufficient facts to establish federal jurisdiction. The order of the district court dismissing the amended complaint herein for want of jurisdiction must be and it hereby is Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Wednesday, January 2, 1963

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

BERNHARD ROSEE, *Plaintiff-Appellant,* vs. THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation, et al., *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13857	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court dismissing the amended complaint herein for want of jurisdiction, in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, January 21, 1963

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

Hon. Kenneth P. Grubb, District Judge

BERNHARD ROSEE, Plaintiff-Appellant, vs. BOARD OF TRADE OF THE CITY OF CHICAGO, et al., Defendants-Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13857	

IT IS ORDERED by the Court that appellant's petition for a rehearing of this cause be, and the same is hereby DENIED.

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk, United States Court of Appeals
for the Seventh Circuit.

(Seal)

Office Supreme Court, U.S.
FILED
APR 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 908

BERNHARD ROSEE,

Petitioner,

vs.

THE BOARD OF TRADE OF THE CITY OF CHICAGO, a corporation; JAMES E. BAGGOT, JR., and DONALD W. MORRISON, individually and as a co-partnership, d.b.a. BAGGOT and MORRISON; HARRIS HAYWOOD; SIDNEY C. HAMPER; MARTIN H. MILEK; ROY C. LOFTUS; RICHARD ROSE; RAYMOND COMENZO and THOMAS H. HERR, individually and as members of the Arbitration Committee of the Board of Trade of the City of Chicago; and WARREN W. LEBECK, individually and as Secretary of the Board of Trade of the City of Chicago,

Respondents.

BRIEF OF RESPONDENTS THE BOARD OF TRADE OF THE CITY OF CHICAGO; SIDNEY C. HAMPER, MARTIN H. MILEK, ROY C. LOFTUS, RICHARD ROSE, RAYMOND COMENZO, AND THOMAS H. HERR; AND WARREN W. LEBECK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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STATEMENT.

We ask that the petition for certiorari be denied.

Petitioner, as a member of the Board of Trade (App. 4),[1]

1. "(App.)" citations refer to the Court of Appeals Appendix filed with this Court; citations to "(Add. App.)" refer to the Court of Appeals Additional Appendix also filed here.

executed his grain transactions on the Board's floor. He then "cleared" his daily trades through the "future commission firm" of Baggot & Morrison, fellow Board members (App. 4, 10).[2] In June, 1960, petitioner fell into dispute with Baggot & Morrison over the status of his account (App. 1, *et seq.*) and when the parties reached an impasse, a claim was lodged with the Board against petitioner for $13,654.41 (App. 4, *et seq.*).

Petitioner was notified by the Board (App. 10; Add. App. 7-8) and he promptly requested arbitration (Add. App. 9):

"June 10, 1960

Mr. Warren W. Lebeck, Secretary
Board of Trade Building
Chicago 4, Illinois

DEAR MR. LEBECK:

Your letter of June 8, 1960 has been received.

In regard to this matter I request that this be referred to the Arbitration Committee of the Chicago Board of Trade. As there are certain circumstances pertaining to this claim that should be arbitrated.

Sincerely,

BERNHARD ROSEE."

The Board of Trade's legislative charter permits it to arbitrate any dispute "as may *voluntarily* be submitted for arbitration" (Session Laws of Illinois, 1859, pp. 13-15, Section 7, Italics ours); the Board's Rules provide that its policy is "to encourage, *but not to compel*, arbitration" (Rule 183, Abst. 9, Italics ours).

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2. Members of the Board of Trade are not allowed to "clear" transactions unless they are also members of the Board of Trade Clearing House Corporation.

Petitioner's letter of June 10 resulted in the arbitration proceeding now in issue. (App. 11.) The arbitration hearing extended over a six-month period and a record of 611 pages plus exhibits was amassed; the ten volumes of the proceedings are a part of the record below. Although petitioner claims there were numerous errors in those proceedings, the record before the arbitrators was neither printed nor cited by petitioner in the Court of Appeals (see petitioner's Court of Appeals briefs and appendix filed with this court).[3]

The arbitrators rendered an award against petitioner for $11,323.78 (App. 11); petitioner appealed and the award was affirmed (App. 19).[4] Petitioner then refused to pay the award and was suspended from membership (App. 9, 19).[5]

Proceedings in the Superior Court of Cook County, Illinois.

After suspension, petitioner filed a suit against the Board of Trade in the Superior Court of Cook County, Illinois, seeking both a mandatory injunction requiring reinstatement to membership and a relitigation of his accounting dispute (Add. App. 13). The factual allegations of that complaint are substantially the same as those contained in the complaint later filed in the District Court in this cause (Add. App. 13, *et seq.*). Almost immediately after the suit

3. Rule 16 of the Seventh Circuit required the petitioner to print those parts of the record as fairly present the issues on appeal.

4. Rule 188 of the Board permits any party dissatisfied with an award to appeal to the Board's Committee of Appeals (App. 19).

5. Rule 130 of the Board provides that a member who refuses to pay an arbitration award shall be suspended from membership until payment. A member may apply for reinstatement by alleging under oath he has discharged his debts (App. 9).

was instituted, petitioner requested an injunction compelling reinstatement *pendente lite* (Add. App. 4); after hearing, the motion was denied (Add. App. 13, *et seq.*). Petitioner thereupon dismissed his action and abandoned that suit (Add. App. 16).

The Proceedings in the District Court.

After nonsuiting in the Superior Court, petitioner filed this suit (Add. App. 13, *et seq.*), alleging that the arbitration and his resultant suspension raised federal questions (App. 1). As in the state court, petitioner asked the federal court to rehear his accounting dispute and reinstate him to membership (Add. App. 13, *et seq.*). The District Court dismissed the case for lack of jurisdiction (Add. App. 15).[6]

QUESTION PRESENTED.

We restate the question presented as the petitioner does not do so fairly:

The only question presented is whether or not petitioner's accounting dispute with the future commission firm of Baggot & Morrison and the arbitration proceedings resolving that dispute raises a federal question?

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6. The petitioner also sought in the District Court, again as in the state court, a *pendente lite* order compelling the Board to reinstate him to membership; this motion was denied (Add. App. 29). At the hearing of this motion, petitioner reargued *de novo* the merits of his arbitration proceeding (Add. App. 19, *et seq.*). On cross-examination, petitioner testified that *after* his suspension he had traded approximately 305,000 bushels of grain in the Chicago market (Add. App. 27-28); yet petitioner's complaint alleges that he lost his means of livelihood as a grain trader because of the suspension (App. 19, 25).

REASONS FOR DENYING THE WRIT.

The petition is without merit because:

First: Due process and equal protection infringements only occur when the claimed acts of deprivation are of state or federal origin. *Shelley* v. *Kraemer*, 334 U. S. 1; *Civil Rights Cases*, 109 U. S. 3. The Board of Trade is, however, a private voluntary organization composed of private members; it is neither vested with state nor federal prerogatives or authority. *Thomson* v. *Thomson*, 293 Ill. 584, 127 N. E. 882. In the *Thomson* case, the Supreme Court of Illinois specifically negated the contention that the Board had any public powers (p. 589):

> "* * * No political or governmental power has been delegated to the Chicago Board of Trade. *The voluntary association of individuals composing that body at the time its charter was granted by the legislature was incorporated with the ordinary powers and privileges of private corporations, with authority to make such rules, regulations and by-laws from time to time as they might think proper* or necessary for the government of the corporation not contrary to the laws of the land, and to establish such rules, regulations and by-laws for the management of their business and the mode in which it should be transacted as they might think proper. There was no grant of any legislative power. The Board of Trade is merely a voluntary organization although incorporated under an act of the General Assembly. (*People* v. *Board of Trade*, 80 Ill. 134.) The grant of the power to adopt by-laws, rules and regulations for the government of the corporation and the management of its business is no more than a recognition of the inherent and implied power which is a necessary and inseparable incident of its existence." (Italics ours.)

Petitioner's suspension by the Board for failure to pay the award was thus not an exercise of state power but was instead the suspension of a member by a private organization for failure to pay an established debt. See *e.g. Board of Trade* v. *Nelson*, 162 Ill. 431. Petitioner's constitutional plaints are accordingly without predicate; there is neither state nor federal action. *United States* v. *Harris*, 106 U. S. 629; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673; *Williams* v. *Yellow Cab Co.*, 200 F. 2d 302.

Second: Petitioner claims that the Board is vested with state functions because (a) its charter accords it arbitration powers and (b) Illinois enforces such award when filed with its courts. Neither contention can withstand analysis:

(a) The Board arbitrates only those controversies voluntarily submitted to it by the disputants; both its charter and rules unequivocally so provide (App. 6, 9) and, in this very case, the Board arbitrated the controversy at petitioner's specific written request. The right to arbitrate disputes when submitted by agreement of the parties is manifestly not an exercise of sovereign authority but is instead by definition the very opposite of state action. *Mygeiron* v. *Chevy Chase Services, Inc.*, 258 F. 2d 155; *Stone* v. *Baldwin*, 226 Ill. 338, 80 N. E. 890.

(b) Illinois enforces the Board's arbitration awards by giving it the efficacy of a judgment only after the proceedings have been fully concluded; so promoting the salutory remedy of private arbitration is not uncommon among the states. (See e.g. Wisconsin Statutes Annotated §§ 298.09, 298.12; Burns Indiana Statutes Annotated § 3-214; Ohio Code Annotated § 2711.12; New Jersey Statutes Annotated, 2A:24-10; Massachusetts General Laws Annotated, Ch. 251 § 19;

Purdon's Pennsylvania Statutes Annotated, Ch. 5 § 58.1.) In Illinois, the selfsame enforcement provisos were likewise applicable to every arbitration award made within the state at the time of petitioner's award so that petitioner's contention would result in every Illinois arbitration becoming a state proceeding. Ill. Rev. Stat. 1959, ch. 10, p. 9. Manifestly, the particular remedy a state selects to recognize an arbitration award (whether by way of independent suit, *Couey* v. *Arrow Coach Lines*, 288 S. W. 2d 192 [Tex. Civ. App.], or by the instant simplified procedure of according the award judgment status) would not convert that arbitration into state action.

Third: Petitioner claims additional constitutional questions are presented because Illinois will not review the Board's arbitration proceedings and because no standards governed the arbitration. The scope of review of arbitration proceedings is solely a matter of state law and, whatever quantum of review is accorded, no constitutional question is raised. *Black* v. *Cutter Laboratories*, 351 U. S. 292.[7] Nor is a constitutional question raised concerning the alleged lack of standards when, as here, neither state nor federal action is involved. *Williams* v. *Yellow Cab Co.*, 200 F. 2d 302; *United States* v. *Cruikshank*, 92 U. S. 542. Moreover, petitioner's claim of lack of standards is not

7. Petitioner also misreads the Illinois law. Illinois reviews any arbitration award alleged to be the product of fraud and has voided arbitration proceedings and also the Board's membership actions when so tainted. *Ryan* v. *Cudahy*, 157 Ill. 108; 41 N. E. 760; *Smith* v. *Smith*, 28 Ill. 56; *Wechsler* v. *Gidwitz*, 250 Ill. App. 136; Ill. Rev. Stat. 1959, ch. 10, § 11. Petitioner presumably abandoned his Illinois suit because of an inability to prove such charges here.

even factual; Board Rule 186 provides petitioner may defend by any defense available to him in law or equity. (App. 7.)

Fourth: The petitioner's reliance upon the Commodity Exchange Act as a basis for review is likewise error; the Commodity Exchange Act contains no proviso for any civil remedy such as is sought here. It was enacted to protect the public generally and is enforced by administrative or criminal proceedings (See 7 U. S. C. A. § 1 *et seq.*); civil remedies are not imputed into such statutes. *Nashville Milk Co.* v. *Carnation Co.*, 355 U. S. 373; *Beegle* v. *Thompson*, 138 F. 2d 875, 880, *cert. den.* 322 U. S. 743; see also *Progressive Miners* v. *Peabody Coal Co.*, 7 F. Supp. 340, 345 (E. D. Ill.); compare *Reitmeister* v. *Reitmeister*, 162 F. 2d 691. When Congress authorizes a civil action pursuant to the several federal commodity laws, it does so explicitly, *e.g.*: the Packers and Stockyards Act, Sections 209 and 216 (7 U.S.C.A. §§ 209, 216); the United States Warehouse Act, Section 249 (7 U.S.C.A. §249); and the Perishable Agricultural Commodity Act, Section 499e (7 U.S.C.A. § 499e).

Additionally and signally, the Commodity Exchange Act is clearly extrinsic to petitioner's accounting dispute with Baggot & Morrison and his suspension for failure to pay an arbitration award, *Anderson* v. *Bingham & Co. Ry.*, 169 F. 2d 328; the petitioner's dispute was clearly nothing more then a common law controversy over the amount of a money debt.

CONCLUSION.

For the foregoing reasons, we respectfully request that the petition for certiorari be denied.

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Respondents.

ADDITIONAL STATEMENT IN SUPPORT OF PETITION FOR CERTIORARI

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Respondents.

ADDITIONAL STATEMENT IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT

Because of the remarkable recitations of fact and the misleading argument made by counsel for the Respondent, it becomes necessary that there be transmitted to this court in the form of an additional Appendix the original Amended Complaint filed in the instant case.

The brief of the Respondents presents allegations of fact which have not been contested in any trial. It must be stressed that this matter did not arise on a motion for summary judgment in which evidentiary material was submitted in the form of affidavits. It arose on a motion to dismiss.

It cannot be stressed too strongly that motions to dismiss complaints for failure to state a proper claim upon which a court may exercise jurisdiction *admit the facts alleged in the complaint.* Moreover, the complaint must be viewed in a light most favorable to the Plaintiff—it is hornbook law that such a motion admits and accepts as true all facts well pleaded. *Radovoch* v. *National Football League*, 355 U. S. 931 and collected cases *Barron* and *Holtzoff*, Federal Practice and Procedure, Volume 1A Pages 321, 322 and 323. There is then before this court a case in which no factual challenge can be offered to the allegations of the complaint.

This amended complaint is set forth in full in the appendix hereto (Pages 1a-27a). It charges expressly:

That the Petitioner was *compelled* to arbitrate a dispute before a body which indulged in gross improprieties; which denied him a fair hearing; which permitted his opponents counsel, and denied representation to him; which was dominated by the Board of Trade itself and which entertained false testimony and indulged in official misconduct described in detail.

Respondent persists in the assertion that the question which related to Petitioner's accounts was voluntarily submitted to arbitration. Under Rule 130 of the Board of Trade, Petitioner had no option. Had the arbitration not proceeded, he was offered one alternative—immediate suspension.

Respondent quotes a letter in its reply (Page 2), to illustrate that the submission to arbitration was voluntary *and deliberately omits the correspondence which preceded it.* These are quoted in the Appendix, Pages 28a-29a. It is obvious that when the correspondence is read together that the lack of basis for the argument made by Respondent is exposed.

Moreover, in the Complaint (App. Pages 11a-16a), it was alleged that the submission to arbitration was compelled and was made under duress. At this time such allegations are not subject to contradiction.

If the Petitioner is granted certiorari and if upon the exercise of such jurisdiction this court should see fit to require that he have his day in court, it will be time enough for the Respondent to file factual denials and affirmative defenses, if any. It seems grossly impertinent for counsel for the Respondent to advance in a footnote on Page 7 of his Brief herein a factual presumption which relates to the inability to prove the charges, an opportunity which the Petitioner has not yet been afforded and which he now earnestly seeks.

Given such an opportunity, he will be able to show, for instance, that in the course of the arbitration proceeding complained of and while the committee was then acting, an inquiry was addressed by the governing official of the Board of Trade to a private law firm (the same law firm which now appears for Respondent) in which the private law firm was asked to sit in judgment upon an evidentiary ruling made a few hours before by the Arbitration Committee! This inquiry prompted a response in writing dated September 23, 1960, in which a member of the law firm presumptuously sat as a reviewing tribunal on an evidentiary question before a body invested with judicial authority by the State of Illinois! (See App. 30a-32a).

In conclusion, it is earnestly requested that this court consider the following:

1. Did the State of Illinois invest the Board of Trade with judicial authority as the Petitioner argues, or is it a mere private corporation without public consequence, as the Respondent submits?

2. Is the Respondent bound by the allegations of fact in the Amended Complaint or may it argue such factual questions in a dispute over Federal jurisdiction?

It is respectfully submitted that this court ought to exercise jurisdiction in order that the Petitioner have his day in court.

Respectfully submitted,

BERNARD H. SOKOL
Counsel for Petitioner.

APPENDIX

54 IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois,
Eastern Division.

Bernhard Rosee,
Plaintiff,

vs.

United States of America, The Board of Trade of the City of Chicago, an Illinois corporation; James E. Baggot, Jr. and Donald W. Morrison, Individually and as a Co-Partnership doing business as Baggot and Morrison; Harris Haywood; Sidney C. Hamper; Martin H. Milek; Roy C. Loftus; Richard Rose; Raymond Comenzo; and Thomas H. Herr, Individually and as Members of the Arbitration Committee of The Board of Trade of the City of Chicago; and Warren W. Lebeck, Individually and as Secretary of The Board of Trade of the City of Chicago,
Defendants.

Civil Action
No. 61 C 1066
Trial by Jury
Demanded.

AMENDED COMPLAINT

Bernhard Rosee, plaintiff, says as follows:

Count I.

1. This is an action for a permanent injunction; an order to reinstate plaintiff to his privileges and rights as a member of the defendant Board of Trade; and for an order setting aside the award rendered by the Arbitra-

tion Committee of the Board of Trade. Further this plaintiff asks this court for a judgment declaring that certain rules of the defendant Board of Trade are invalid and unconstitutional. The amount in controversy exceeds $10,000.00.

2. The jurisdiction of this court attaches and is invoked under the Constitution and laws of the United States, including the First Amendment, the Fifth Amendment and Fourteenth Amendment of the Constitution, the Judicial Code (28 U. S. C. A. § 1346) and the Commodity Exchange Act (7 U. S. C. A. §§ 1 to 17).

55 This court also has jurisdiction over this cause because it is a suit to enjoin the enforcement against the plaintiff of an award made by the Committee of Arbitration of the Board of Trade of the City of Chicago under certain purported rules and regulations of the said Board of Trade of the City of Chicago governing the said Committee of Arbitration, and to enjoin the deprivation of the rights of the plaintiff as a member of the Board of Trade of the City of Chicago, as being in conflict with the First Amendment and Section 1 of the Fourteenth Amendment of the Constitution of the United States. The enforcement of said award and said rules and regulations of the Board of Trade of the City of Chicago as applied to the plaintiff deprive the plaintiff of his liberty and property without due process of law under color of an act of the Legislature of the State of Illinois approved February 18, 1959 as amended creating said Board of Trade of the City of Chicago and said Committee of Arbitration as hereinafter more fully set forth herein and denies to the plaintiff the equal protection of the laws. This court has original jurisdiction by virtue of the United States Code Annotated Title 28 Section 1343 (3) as Amended entitled "Civil Rights" which states that the district courts shall have original

jurisdiction of any civil action authorized by law to be commenced by any person: (3) "To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States", June 25, 1948 C 646, 62 Stat. 932, and also by virtue of the United States Code Annotated Title 42 Section 1983.

56 3. Defendant Board of Trade is a corporation created by the Legislature of the State of Illinois and has been designated a "contract market" by the Secretary of Agriculture. Under the provisions of the Commodity Exchange Act, § 6a (7 U. S. C. A. § 8), the "contract market" has the duty of enforcing its own rules, including the rules concerning arbitration of disputes and claims among members of the Board of Trade and Futures Commission merchants, also members of the Board of Trade. Under § 6b (7 U. S. C. A. § 9), of the Commodity Exchange Act the Commodity Exchange Authority has the duty of requiring the contract market to enforce the rules of the contract market. Under other provisions of the Commodity Exchange Act, the Commodity Exchange Authority, an agency of the United States of America, has the duty to enforce the Act in such manner that the public, and members of the contract market, including members who are customers of a "Futures Commission merchant" are not cheated or defrauded in dealings on the contract market. The contract market must furnish the Secretary of Agriculture with copies of all by-laws, rules, regulations and resolutions as provided in § 5a(1) of the Commodity Exchange Act, (7 U. S. C. A. § 7a(1)). Contracts resulting from the execution of orders for the purchase and sale of

commodities on the Board of Trade are capable of being used for hedging transactions in interstate commerce in the commodities traded or the products or by-products thereof, or for determining the price basis of transactions in interstate commerce in the commodities traded, or for delivering said commodities sold, shipped, or received in interstate commerce.

2. At all times herein mentioned, plaintiff was a member of the defendant Board of Trade and at the time of the transactions which are the subject of this count, was a customer of defendants James E. Baggot, Jr., and Donald W. Morrison, doing business as the firm of
57 Baggot and Morrison and designated as a "futures commission merchant." Defendant Donald W. Morrison filed a claim with the Board of Trade against the plaintiff wherein said defendant Donald W. Morrison claimed that said plaintiff owed the said defendant a sum as hereinafter more particularly set out, for trading losses incurred by the plaintiff in his dealings with the defendant firm of Baggot and Morrison. The plaintiff thereby was compelled to submit the claim above mentioned to an Arbitration Committee of the defendant Board of Trade for a decision. Plaintiff requested the committee of arbitration to order the claimant, Donald W. Morrison, to produce all of the books and records the plaintiff requested in order to enable him to make a proper and adequate defense in the arbitration proceeding. The Arbitration Committee denied plaintiff's request, whereupon the plaintiff requested of the Commodity Exchange Authority, orally and by letters, that said Commodity Exchange Authority issue an order either to the Arbitration Committee, or to the claimant directly that such records and books be produced to assist the plaintiff in making his defense and proving his claims.

The Commodity Exchange Authority, although having found the defendant firm of Baggot and Morrison guilty of having the customers segregated account in an "Undersegregated" condition during the times during which the transactions took place which are the issue herein, and further said Commodity Exchange Authority having full knowledge that the ownership of an account was at issue in the arbitration hearing and that plaintiff had been denied the books and records in violation of Rules 153 and 186 of the Board of Trade, failed and refused to issue any orders for the production of the records and books requested. The Commodity Exchange Author-
58 ity failed and refused to perform its duty in keeping with the provisions of the Act and the spirit and intent of the Act of Congress as expressed in the Act and further acquiesced in the violation of the rules of the Board of Trade and permitted an erroneous award to be entered against the plaintiff.

Such denial, refusal and acquiescence on the part of the Commodity Exchange Authority was a denial of due process of law on the part of said Commodity Exchange Authority in violation of the provisions of the Fifth Amendment of the Constitution of the United States and resulted in a taking of plaintiff's property without due process of law.

5. The plaintiff, under Rule 160 of the Board of Trade, was denied the right to be represented by counsel in the arbitration proceeding while at the same time the committee permitted the claimant to employ professional counsel, thereby resulting in a great disadvantage to the plaintiff. Plaintiff informed the Commodity Exchange Authority of the denial of counsel as aforementioned, and requested that the Commodity Exchange Authority take such action as was necessary and issue an order or directive to the Arbitration Committee to grant plaintiff

the right to have counsel at said arbitration proceeding. The Commodity Exchange Authority refused to grant plaintiff any assistance whatsoever in obtaining the right to have counsel at the arbitration proceeding though there was a clear duty on the part of said Commodity Exchange Authority to order said Arbitration Committee to rectify the unfair application of Rule 160 of the 59 Board of Trade. Said failure on the part of the Commodity Exchange Authority to act as aforesaid, was a denial of due process on the part of said Commodity Exchange Authority in violation of the Fifth Amendment of the Constitution of the United States and was a taking of plaintiff's property without due process of law. Plaintiff further herein challenges the validity of said Rule 160 of the Board of Trade and hereby asks this court to hold that said Rule 160 is invalid and unconstitutional.

6. The duties and responsibilities (jurisdiction) of the committee of arbitration and defendant Board of Trade are described in part in the enabling act of the General Assembly of the State of Illinois which among other things provided as follows:

> "Section 7. Said corporation may constitute and appoint Committees of Reference and Arbitration, and Committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the Rules, Regulations, or By-Laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the Association, or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpoenas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute."

"Section 8. When any submission shall have been made in writing and a final award shall have been rendered, and no appeal taken within the time fixed by the Rules or By-Laws, then, on filing such award and submission with the Clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court."

7. The duties and responsibilities (jurisdiction) of said committee are further prescribed by the following rules of the said Board of Trade:

"187. Award of Committee of Arbitration.—After such hearing, the Committee of Arbitration shall file its award in writing with the Secretary, who shall deliver copies thereof to all interested parties. Such award shall be rendered according to the facts disclosed by the evidence and according to the Rules and Regulations of the Association and the laws of the land."

"186. Conduct of Trial.—The Committee of Arbitration shall hear all evidence submitted by the parties relative to such controversy, which evidence shall be taken under oath or affirmation and shall be duly recorded. The member resisting the claim may make any defenses before the Committee which would be available to him in a court of law or equity."

"185. Oath of Arbitrators.—Before taking office the members of both Committees shall be sworn faithfully and fairly to hear, examine, and determine all controversies according to the principles of equity and justice and to make just and true awards according to the best of their understanding. Such oath may be administered by any person authorized and administer oaths."

"160. Professional Counsel Excluded.—No member of the Association shall have the right to be represented by professional counsel in any investigation

or hearing before the Board or any Standing or special Committee."

"1866. Interpreting Rules 202-A and 258 and Regulation 1809-A.—All future transactions resulting in change of ownership (except those involving the exchange of futures in cash transactions) must be made in the open market in the manner prescribed by Rules 202-A and 258."

61 "202-A. Orders Must Be Executed in The Public Market.—All orders received by asy member of this Association, firm or corporation, doing business on Change, to buy or sell for future delivery any of the commodities dealt in upon the Floor of the Exchange (except when in exchange for cash property) must be executed competitively by open outcry in the open market in the Exchange Hall during the hours of regular trading and under no circumstances shall any member, firm or corporation assume to have executed any of such orders or any portion thereof by acting as agent for both buyer and seller either directly or indirectly, in their own name or that of an employee, broker or other member of the Association; provided that on transactions where brokers as agents for other members meet in the execution of orders in the open market and without prearrangement unintentionally consummate a contract for the one and same clearing member principal, such transactions shall not be considered in violation of this Rule."

"258. Time and Place for Trading.—Dealings upon the Exchange shall be limited to the hours during which the Exchange is open for the transaction of business, and no member shall make any transaction in securities with another member except at the post designated for the particular security in which the transaction is made and no member shall make any transaction for future delivery of a commodity except in the pit assigned to trading in such commodity, except as provided in Regulation 1809. No member shall make, in the rooms of the Association, a transaction with a non-member, in any commodity

or in any security admitted to dealing on the Exchange; but this Regulation shall not apply to transactions with an employee of the Association or of the Clearing House engaged in carrying out arrangements approved by the Board to facilitate the borrowing and lending of money."

"183. What Disputes May Be Arbitrated.—The policy of the Association is to encourage, but not to compel, the arbitration of disputes. Persons (members or non-members) desiring to arbitrate any dispute shall notify the Secretary, who shall thereupon submit to the parties for their signatures, a form of agreement, submitting the dispute to arbitration. After the parties have signed such agreement, the Secretary shall refer the dispute to the Committee on Arbitration."

62 "130. Suspension for Default.—Where a member fails or refuses to perform an exchange contract with or pay obligations arising out of such contracts to another member, the defaulting member, on complaint of the other member, shall be suspended until the contract is performed or the debt satisfied. Registered firms and corporations shall be deemed members under this Rule. If the members alleged to be in default denies the default, he shall be entitled to have the claim arbitrated. If the claim is admitted to established by a final arbitration award, the defaulting member shall be suspended until he has satisfied and discharged all debts owing to members on exchange contracts. Applications for reinstatement shall allege, under oath, that all such debts have been discharged, and notice of such application shall be posted on the bulletin board fifteen days prior to the hearing of such application."

That the said rules and regulations governing the said Committee of Arbitration do not contain any definitive standards or other controlling guides governing the action of the Committee of Arbitration in making an award, although the said Act of the Legislature creating said Board of Trade and said Committee of Arbitration pro-

vides that an award shall have the same force and effect as a judgment entered by court of record. That under such circumstances the making of an award is in the uncontrolled discretion of said Committee of Arbitration and the said Committee may make an award according to their whims or personal desires. That the said award made by the said Committee of Arbitration against the plaintiff was completely arbitrary and discriminatory and a denial of the equal protection of the laws.

8. That the plaintiff, Bernhard Rosee, on or about March of 1958 commenced clearing his trading transactions on the said Board of Trade with the firm of Baggot and Morrison and continued to so deal with said firm until on or about May 20, 1960.

63 9. That during said term of business dealings, there arose disputes between plaintiff, Bernhard Rosee, and the firm of Baggot and Morrison.

10. That on or about June 8, 1960 Plaintiff received a letter dated June 8, 1960 from the Board of Trade of the City of Chicago, advising him that the Board of Directors had received a claim against the plaintiff in the sum of $13,654.41 filed by said Donald W. Morrison under the provisions of Rule 130 of the Board of Trade, and informing plaintiff that the board intended to consider this claim at a regular meeting to be held on June 21, 1960, at which time it should have a reply in writing. There was enclosed in said letter a copy of the said claim and the said Rule 130. The said copy of said claim was addressed to the Board of Directors of the Board of Trade and alleged that plaintiff was justly indebted to the said Donald W. Morrison in said sum and refused to settle the same, and requested that plaintiff be suspended from all privileges of membership in said Board of Trade. Plaintiff in order to prevent a suspension from the said Board of Trade under said Rule 130 was com-

pelled to and did deny the said claim because of numerous improper charges made to plaintiff's account, and was required by said Rule 130 to submit said claim to arbitration. That said submission to arbitration by the plaintiff was compulsory and not voluntary and under duress in that the plaintiff was threatened with and was subject to suspension by the Board of Directors of the said Board of Trade of the City of Chicago if he did not deny the said claim of the said Donald W. Morrison
64 and submit the same to arbitration under the said Rule 130 referred to in the said letter from the Board of Trade of the City of Chicago dated June 8, 1960, which in effect advised plaintiff that if he did not deny the said claim and submit to arbitration, he would be suspended.

Plaintiff further alleges that under the express provisions of Section 7 of the Enabling Act of the General Assembly of the State of Illinois, creating the said Board of Trade of the City of Chicago, the said Board of Trade of the City of Chicago did not have the power to constitute and appoint a Committee of Arbitration for the settlement of such matters which were not voluntarily submitted, but only had the power to constitute and appoint a committee to hear matters which were voluntarily submitted and had no power to constitute a committee to hear and pass upon the said claim of the said Donald W. Morrison against the plaintiff under said Rule 130, which compelled plaintiff to submit to arbitration or be suspended from his rights and privileges as a member of the Board of Trade. That said Board of Trade did not have the power to make said Rule 130 of said Board of Trade, and said rule is invalid and the said award made by the said Committee of Arbitration under color of said Section 7 of said Enabling Act creating said Board of Trade and said Rule 130 is likewise invalid and void and

a denial of plaintiff's liberty and property without due process of law under the Federal Constitution.

11. Plaintiff further alleges that after receiving the said letter of June 8, 1960 from said Board of Trade of the City of Chicago notifying him of said claim of Donald W. Morrison and the hearing thereon, plaintiff wrote a letter dated July 7, 1960, addressed to Warren W. Lebeck, Secretary of the Board of Trade requesting the records relating to said claim of the said Donald W. Morrison, specifying trading cards prepared by plaintiff and other records. On or about July 13, 1960, plaintiff received a letter from said Board of Trade by Warren W. Lebeck bearing said date advising him that said records would necessarily be a part of the evidence submitted to the Arbitration Committee, but contrary to the said letter the said Committee in the course of said arbitration hearing refused to require production of said records and suppressed evidence bearing on the merits of said claim as hereinafter more fully appears. That the said representation by said Board of Trade that said records relating to said claim of Donald W. Morrison would be placed in evidence in said arbitration hearing was relied upon by plaintiff in proceeding with said arbitration and was false and fraudulent. That said Committee on arbitration was partial to the said Donald W. Morrison and prevented plaintiff from making a defense against said claim and plaintiff was therefore deprived of an opportunity to defend himself before an impartial tribunal and was deprived of liberty and property without due process of law contrary to the Constitution of the United States.

Plaintiff further alleges that on December 16, 1960 an award was made by the Committee of Arbitration in favor of the said Donald W. Morrison and against the

plaintiff finding that there was due to the said Donald W. Morrison from the plaintiff the sum of $11,323.78.

66 12. The Arbitration Committee, the members thereof, and each of them, defendants herein, acting under color of the authority of an act of the Illinois legislature creating such Board of Trade and Committee with powers of subpoena and to render awards and acting further under the power conferred upon them by the Commodity and Exchange Act and the rules and regulations of the Secretary of Agriculture, pursuant thereto, failed to give plaintiff even the rudiments of a fair trial or hearing on the merits of either the claim against him or his counterclaim, as required by the due process of law of the Constitution of the United States, and it deprived plaintiff of his property without due process of law as will hereinafter more fully appear:

(a) Under color of Rule 160 the Committee denied plaintiff the right to professional counsel but permitted one James J. Coughlin, a member of the bar of Illinois and a practicing lawyer with law offices at 33 North La-Salle Street, Chicago Illinois, to represent defendant Morrison.

(b) The Committee refused to entertain any counterclaim or set-off in behalf of plaintiff pertaining to the subject matter as set forth in Count II hereof.

(c) Said Committee refused to require a production of pertinent records such as trading cards, purchase and sale slips, street books, money withdrawals and receipts therefor.

(d) Said committee further refused to require a full and complete accounting to the plaintiff of his accounts so as to determine whether or not he had been credited with the proper amounts due him. Said committee failed to require such complete accounting even though the Com-

mittee had full knowledge that said firm of Baggot
67 and Morrison had taken various sums from plaintiff's account without his knowledge or consent and further also had knowledge that defendant Baggot and Morrison had been found guilty by the Commodity Exchange Authority of having the firms Customer accounts in an undersegregated condition at times as much as $37,000.00 during the time of Plaintiff's dealings with said defendant firm of Baggot and Morrison.

(e) Said Committee not only allowed defendant Morrison (whose partner James T. Baggot, Jr. in the firm of Baggot and Morrison was a member of the Board of Directors of defendant Board of Trade) to have professional counsel while denying such right to plaintiff, but said Committee allowed itself to be dominated by said counsel (also a member of the Board of Directors of defendant Board of Trade) said counsel at times assuming the role of chairman, witness, prosecutor and inquisitor. Plaintiff being unskilled in the practice of law was utterly unable to cope with the technicalities improperly asserted against him.

(f) The Committee wrongfully recognized as valid, a transfer of an account from one Soble to plaintiff which transfer was contrary to Rule 1866 of the Board of Trade and which in addition is contrary to the provisions of the Commodity Exchange Act. In addition the Committee charged a spurious account 35 to Plaintiff even though the evidence was overwhelming that said account had been opened without a name and address as required by Section 1.37 of the Commodity Exchange Act.

(g) The Committee assessed insurance premiums
68 against Plaintiff on an insurance policy on the life of plaintiff taken out by defendants Baggot and Morrison, even though such insurance premiums did not pertain to exchange contract and although the Committee's

jurisdiction was limited to matters pertaining to the refusal or failure to perform exchange contracts (Board of Trade Rule 130) while at the same time said Committee refused to entertain Plaintiff's Counterclaim against defendant Morrison on the pretense that such Counterclaim of plaintiff did not pertain to exchange contracts but pertained to tort matters.

(h) In order to justify the wrongful closing of plaintiff's accounts as stated in Count II hereof and to diminish the apparent extent of the undersegregated condition of defendant Baggot and Morrison's customers Segregated funds account said Committee refused to receive evidence from plaintiff of the undersegregated condition of said defendant's customer account, refused to receive and require the production of evidence of plaintiff's trading records and account to show that he had ample deposits at the time of such wrongful closing, as required by Rule 209, accepted obviously manufactured and not genuine records from defendants Baggot and Morrison pertaining to a spurious account 35 which they attributed to plaintiff to make it appear that he had inadequate deposits to maintain his trading position under said Rule 209, and to charge him with trading losses not incurred by him.

(i) The Committee denied plaintiff his records, namely: trading cards, purchase and sale slips, the street book 69 and other records which would substantiate plaintiff's claim that Account 35 did not belong to plaintiff.

(j) The Committee refused to subpoena witnesses which plaintiff required to present his defense of the charges brought by defendant Morrison in said hearings, although they had the power and the duty so to do, and although repeatedly requested by plaintiff to subpoena certain persons who would testify on behalf of plaintiff.

(k) One of the Purchase and Sale slips which the Committee found to bear the name of plaintiff and upon which

the Committee relied on its finding that the spurious account 35 was chargeable to plaintiff actually was not presented to said Committee at the hearings but was submitted outside the presence of plaintiff at a time and place unknown to plaintiff and after the conclusion of the hearings.

(l) Defendant Sidney Hamper and Martin H. Milek, members of the Arbitration Committee, informed Plaintiff after the third session of the hearing and before Plaintiff had even adduced any evidence in his behalf, that they, the Committee members, had already decided against Plaintiff and that he, Plaintiff, would have to pay the award. Further, several members of the Arbitration Committee conversed at length with defendant Donald W. Morrison and his attorney outside the presence of the plaintiff during the time the Arbitration Hearings had commenced and before they had been concluded.

(m) The Committee completely disregarded evidence offered by Plaintiff showing that defendants Baggot and Morrison made several reports to the Commodity and Exchange Authority as required by the Commodity and Exchange Act pertaining to plaintiff's holdings of commodities in excess of 200,000 bushels of soybeans for future delivery which proved that account 35 does not belong to plaintiff.

(n) The Committee permitted the attorney for defendant Donald W. Morrison to introduce remarks concerning Plaintiff's suspension by the Board of Trade on another totally unrelated matter, which remark was intended to and did prejudice the Committee against Plaintiff and deprive him of a fair and impartial hearing.

(o) The Committee violated the agreement of submission and the laws pertaining to arbitration and all traditional requirements of a fair trial in that they improperly delegated their duties and responsibilities to determine

the controversy to others, who they knew or should have known could not render a fair and impartial determination of the issues presented.

13. The conduct of the Committee aforesaid, in wilfully disregarding and exceeding its jurisdiction, in failing to abide by the Rules and Regulations of the Board of Trade and the enabling act and the Commodity and Exchange Act, and the Rules and Regulations of the Secretary of Agriculture pursuant thereto, its refusal to allow Plaintiff to be represented by counsel, its prejudicial misconduct in prejudging the case, its members frequent discussion of the case with parties to said Arbitration out of the presence of plaintiff, its improper delegation of its duties to persons unable to render unbiased opinions, its flagrant disregard and refusal of evidence on behalf of plaintiff, its refusal to subpoena witnesses, its receipt of spurious evidence on behalf of commission merchant defendants, its refusal to acquire all pertinent records and its covering up the violation of the criminal law on the part of defendant commission merchants and violations of the Commodity and Exchange Act and the rules and regulations of the Secretary of Agriculture pursuant thereto, its disregard of the evidence presented to it, and its decision against plaintiff which was against the manifest weight of the evidence and all other acts if misconduct set forth herein constituted a fraud again Plaintiff.

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14. That the said Arbitrators acted under undue influence of the said Board of Trade and rendered their decision without regard to the rules and regulations of the Board of Trade, Constitution and laws of the United States or Constitution or laws of the State of Illinois and further rendered said decision contrary and against the manifest weight of the evidence submitted, depriving Plaintiff of his property without due process of law.

15. The Plaintiff has been an outspoken advocate of certain legislative changes with respect to agricultural legislation and has testified before several legislative committees. That the said legislation advocated by Plaintiff was contrary to the financial interests of many of the officials of the Board of Trade. That his outspoken support of said legislation has made him the subject of Board of Trade Committee inquiries. That various officials of
72 said Board of Trade have from time to time interfered with Plaintiff's efforts on behalf of said legislation and have interfered with his freedom of speech, secured by the Constitution of the United States by the use of their positions as officials of said Board of Trade.

16. That from time to time Plaintiff publicly criticized various officials of the said Board of Trade for various activities that, in Plaintiff's view, were contrary to the best interest of the public. That said criticism made him the subject of investigation by Board of Trade Committees. That because of said criticism, Plaintiff has been harassed by certain of the officials of the said Board and otherwise interfered with in the conduct of Plaintiff's business.

17. That the defendant Board of Trade in the City of Chicago did, through its officers, agents and attorneys, unduly influence the said defendant Arbitrators, the said officers having set out over a period of years on a course of action calculated to suspend and expel Plaintiff from the said Board for the purpose of preventing Plaintiff from exposing certain activities by certain of the officials of said Board for the purpose of preventing Plaintiff from exposing certain activities by certain of the officials of said Board, and to punish Plaintiff for openly supporting legislation which was contrary to the financial interests of said officials and in conflict with the policies

dictated by said officials to the membership of said Board.

18. Defendant Harris Haywood, during the hearings aforementioned, assisted defendant Morrison and the firm of Baggot and Morrison in the production of the aforesaid manufactured evidence of said spurious account 35, 973 gave false testimony pertaining to the purported ownership of said account as the office manager of said firm while it was in existence.

19. Plaintiff further alleges that said Board of Trade of the City of Chicago pursuant to the authority and power granted by the Legislature in said act incorporating the said Board of Trade constituted and appointed a Committee of Appeals and adopted Rule 189 purporting to control and govern the members of said committee and the procedure on such appeal. Plaintiff further alleges that on December 22, 1960 he filed a written notice of appeal with the Committee of Appeals as required by Rule 188 of the said Board of Trade. On December 27, 1960 petitioner was informed that said appeal would be considered on that day. Plaintiff on December 28, 1960 filed a petition with the said Committee of Appeals for leave to present in writing a memorandum in support of his appeal, but such leave was denied by the said committee and said award of the Committee of Arbitration was affirmed on February 15, 1961. That plaintiff was thereby deprived of an opportunity to properly present said appeal and an opportunity to be heard by said Committee of Appeals and enforce and protect his rights before said Committee. That the failure of the said Committee of Appeals to give the plaintiff an opportunity to present his appeal was arbitrary and discriminatory. That the said rules of the Board of Trade do not contain any controlling guides or standards governing the action of the members of the said committee in considering said appeal and the authority conferred upon them by the Act of the said Legisla-

ture is exercisable in the uncontrolled discretion of the committee.

74 20. That plaintiff has already suffered and will continue to suffer irreparable injury for which he has no adequate remedy at law because of the suspension by the Board of Trade of the plaintiff's rights and privileges as a member of the Board of Trade, thereby depriving plaintiff of an occupation and means of making a livelihood. Unless the plaintiff is granted injunctive relief against the enforcement of the said award and the said rules and regulations of the Board of Trade, plaintiff will continue to lose large sums of money because of his inability to pursue his occupation as a member of the Board of Trade far in excess of $10,000.

21. That Plaintiff is without funds to post bond and that the defendants, and each of them, would suffer no damage or be prejudiced by the issuance of a temporary order of reinstatement without plaintiff posting bond.

22. That the said award of the said Committees of Arbitration and Appeal and the said rules and regulations of the Board of Trade of the City of Chicago governing the conduct of the said Committee of Arbitration and the Committee of Appeals and the hearings before said committees are invalid and unconstitutional and their threatened enforcement against the plaintiff is in violation of plaintiff's constitutional rights in the following respects:

(a) They are in violation of plaintiff's right not to be deprived of liberty and property without due process of law under Section 1 of Amendment XIV of the Con-

75 stitution of the United States;

(b) They are in violation of plaintiff's right o equal protection of the laws under Section I of Amendment XIV of the Constitution of the United States;

(c) The said rules and regulations of said Board of Trade of the City of Chicago do not contain definitive

standards governing or controlling the members of the said Committee of Arbitration and Committee of Appeals and the hearings before said Committees of Arbitration and Appeal and the rendition of an award by said committees and the suspension of a member of the Board of Trade of his rights and privileges; that said rules and regulations permit arbitrary action and abuse of discretion by the members of said committees and are applied in an arbitrary and discriminatory manner as above alleged.

23. Plaintiff further alleges that Sections 7 and 8 of the act of the General Assembly of the State of Illinois creating said Board of Trade of the City of Chicago and authorizing it to create a Committee of Arbitration and make an award, which when filed with the Clerk of the Circuit Court shall have the same effect as a judgment rendered in said court, confers judicial powers upon the said Committee of Arbitration in violation of Article 6, Section 1 of the Constitution of the State of Illinois, which provides that the judicial powers shall be vested in the courts therein named and said sections 7 and 8 of said Enabling Act are therefore invalid. That the said award made by the said Committee of Arbitration under color of said invalid statute was void and the suspension of
76 the plaintiff's rights and privileges as a member of the Board of Trade upon nonpayment of said award was likewise invalid and void and a denial of plaintiff's liberty and property without due process of law under the Federal Constitution.

Wherefore, Plaintiff prays as follows:

1. That the Court may order the issuance by its Clerk, under seal, a writ of temporary reinstatement, reinstating order and injunction herein, enjoining and restraining.

A. Defendants, James E. Baggot, Jr., Donald W. Morrison, Baggot and Morrison, and Board of Trade of the City of Chicago, an Illinois corporation, their officers, directors, agents, employees, and attorneys, heirs, executors and assigns, and each of them, from, by legal means or otherwise, enforcing the award of the Committee of Arbitration or the Committee of Appeals of the Board of Trade of the City of Chicago in the case of Donald W. Morrison *vs.* Bernhard Rosee.

B. The Defendant Board of Trade of the City of Chicago, its officers, directors, agents, employees and attorneys, from interfering with the rights and privileges of plaintiff Bernhard Rosee as a member of the Board of Trade of the City of Chicago, particularly the right to trade on the floor of the exchange, said temporary injunction to remain in effect pending final determination by the Court of the issues in the Complaint herein and further that Defendant Board of Trade be ordered to restore Plaintiff to all privileges of the contract market.

77 2. That said injunction and reinstatement order may be issued without bond.

3. That upon final hearing and determination of this case, the said temporary injunction and reinstatement order may be made permanent.

4. That the award of the Committee of Appeals and Committee of Arbitration, both of the Board of Trade of the City of Chicago in the case of Donald W. Morrison *vs.* Bernhard Rosee be set aside or modified.

5. That the Defendant United States of America, through its agents, servants and employees, Department of Agriculture, Commodity Exchange Authority, Chicago office, be ordered and directed to produce all of the records, data and compilations and any and all information pertinent to the complaint and findings in the issuance of complaint-CEA Docket No. 93 Administration Hearing under

the Commodity Exchange Act and further that said defendant, its agents, servants, and employees, Commodity Exchange Authority, Chicago Office, be ordered and directed to appear on a trial of this cause and then and there testify as to all matters contained in the investigation and findings in said CEA, Docket No. 93.

6. That this court enter a judgment finding Rule No. 130, 160, 185, 186, 187, 189 of the Board of Trade of the City of Chicago and all other rules, or portions thereof, governing the making of an award by the Committee
78 of Arbitration and the conduct of the trial before said Committee unconstitutional and void, and that a judgment be entered declaratory of the rights of plaintiff.

7. That Plaintiff may have such other and further or different relief in the premises as the court may deem equitable and proper.

8. For costs of suit.

Count II.

1. Plaintiff realleges paragraphs 1 through 23 of Count I and makes the same part of this Count II of Plaintiff's Complaint.

2. Said Defendant Baggot and Morrison failed to maintain sufficient segregated funds to pay all credits and equities due its customers and on November 9, 1959 was in an undersegregated condition as to such accounts to the extent of, approximately $37,000.00, and in an attempt to make up such deficits, Defendant Morrison on behalf of said Defendant firm, wrongfully closed out Plaintiff's account on a pretense that Plaintiff's deposit under Board of Trade Rule 209 was insufficient but did so without giving Plaintiff any previous opportunity to supply a specified amount as required by said Rule. In so closing Plaintiff's trading account on November 9, 1959, the said Defendant Morrison, acting for the firm of Defendants Baggot and

Morrison acted in wilful, wanton and deliberate violation of said Rule in order to diminish the firm's undersegregated position aforesaid, and notwithstanding the fact
79 that Plaintiff offered any and all deposits that said firm might then reasonably fix as a requirements under said Rule.

3. As a direct and proximate result of such wrongful closing of Plaintiff's trading account, which at the time held a short position of 170,000 bushels of soybeans for delivery in March of 1960, the said contract was liquidated by said firm as follows:

100,000 bushels at $2.31¾ per bushel and
70,000 bushels at $2.31⅞ per bushel

resulting in a loss of $24,492.50, instead of a profit of $36,799.00, which would have resulted if said account had not been wrongfully liquidated and said beans had not been bought until December 17, 1959, at which time the market price was $2.10 per bushel, all to the Plaintiff's loss and damage in the sum of $36,799.00.

4. Subsequently a special account was opened in Plaintiff's name with the understanding that defendant Morrison on behalf of the firm of Baggot and Morrison would adjust the matter of Plaintiff's regular account, but no adjustment was made pursuant to said understanding.

5. That on, to-wit: April 1, 1960 and April 4, 1960, Defendant liquidated a short position of 25,000 bushels of soybeans on each such occasion Plaintiff had sufficient deposits in the special account as required by the rules and regulations of the Board of Trade. Thereafter the market dropped 8½ points resulting in a loss of profits to plaintiff of $1,680.00 and $2,086.25, respectively, from each of said transactions.

80 6. On April 4, 1960, at a time when Plaintiff had sufficient funds on deposit in a special account, he

directed Defendant Morrison to sell short 50,000 bushels of soybeans for May, 1960 delivery and without demanding or fixing any required additional deposits as required by the rules and regulations of the Board of Trade, said defendant Morrison failed to execute said sale and the market price of such beans dropped 8 points resulting in a loss of profit to Plaintiff, all to Plaintiff's damage in the sum of $3,972.50.

Wherefore, Plaintiff asks judgment in the sum of forty-four thousand five hundred thirty-seven and 75/100 dollars ($44,537.75).

Count III.

1. Plaintiff realleges each and every allegation of paragraphs 1 through 23 of Count I and makes the same part of this Count III of Plaintiff's Complaint.

2. That at the time of the commission by Defendants of the grievances hereinbefore mentioned and for a long time prior thereto, Plaintiff was a trader in commodities and various contract markets throughout the world, including the said Board of Trade and he has always conducted himself with efficiency, honesty and punctuality, and was always deservedly held in high esteem by all those with whom he had dealings in said business, as a commodity trader, and said business was his sole means of support.

81 3. That well knowing the premises but maliciously and wickedly contriving and intending to injure and destroy Plaintiff's good name, credit and reputation in his said business and bringing him into disgrace among his fellow traders and members of said Board of Trade and other contract markets and brokerage houses with whom he had dealings as aforesaid, to cause him to be regarded as a person unfit and unworthy to perform such trades and dealings and as a person of no credit or sub-

stance and as a welcher, defendants and each of them maliciously and wrongfully caused Plaintiff to be wrongfully found to have failed to meet his trading commitments to defendant Donald W. Morrison and to be suspended from said Board of Trade.

4. As a result of the wrongful acts of Defendants, Plaintiff has been deprived of his livelihood and has further suffered injury to his good name, credit and reputation in his business, all to plaintiff's actual damage in the sum of Five Hundred Thousand Dollars ($500,000.00) and for the further sum of One Million Dollars ($1,000,000.00) as exemplary damages.

Wherefore, Plaintiff asks judgment in the sum of Five Hundred Thousand Dollars ($500,000.00) actual damages and One Million Dollars ($1,000,000.00) exemplary damages.

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State of Illinois, }
County of Cook, } ss.

Bernhard Rosee, being first duly sworn, on oath deposes and says that he is the plainfiff in the foregoing suit, that he has read the foregoing amended complaint and knows the contents thereof, and that the same are true to the best of his knowledge, information and belief.

Bernhard Rosee.

Subscribed and sworn to before me this 21st day of September, 1961.

Ruth E. McConnaughey,
Notary Public.

(Seal)

Chicago, June 3d, 1960.

To The Board of Directors of the
Board of Trade of the City of Chicago.
Gentlemen:

Bernard Rosee

.....

is justly indebted to the undersigned in the sum of $13,654.41 being one-half of a total indebtedness of $27,308.83 of the said Bernard Rosee to Baggott & Morrison, a partnership, no longer doing business as such, the said sum of $13,654.41 being this claimant's interest in said indebtedness.

The undersigned therefore requests that.....

Bernard Rosee

be suspended from all privileges of membership in the Board of Trade of the City of Chicago, under the provisions of Rule 130 of the Rules of the said Board of Trade of the City of Chicago.

Respectively,

/s/ Donald W. Morrison.

BOARD OF TRADE
OF THE CITY OF CHICAGO.
Zone 4
Executive Offices

June 8, 1960.

Mr. Bernhard Rosee
Board of Trade
Chicago 4, Illinois

DEAR MR. ROSEE:

The Board of Directors at their regular meeting held on Tuesday, June 7, 1960, received a claim against you in the amount of $13,654.41, filed by Donald W. Morrison under the provisions of Rule 130.

I am enclosing a copy of the claim and also a copy of Rule 130 so that you may understand your rights and obligations.

The Board intends to consider this claim at its next regular meeting to be held on Tuesday, June 21, 1960, and has asked me to inform you that it should have any reply from you in writing prior to that time so that it may be considered.

Yours very truly,

/s/ Warren W. Lebeck,
Secretary.

WWL:ew
encs.

(Letterhead of)

KIRKLAND, ELLIS, HODSON, CHAFFETZ & MASTERS

(Omitting Firm Names)

September 23, 1960

Mr. Robert C. Liebenow, President
Board of Trade of the City of Chicago
141 West Jackson Boulevard
Chicago, Illinois

Dear Mr. Liebenow:

Re: Donald W. Morrison vs. Bernhard Rosee

This matter is pending before the Arbitration Committee of the Board of Trade.

Mr. Morrison has introduced into evidence the ledger accounts of Mr. Rosee with the firm of Baggott & Morrison, purporting to show an indebtedness of Mr. Rosee to that firm in the amount set forth in Mr. Morrison's claim. Both Mr. Morrison and Mr. Haywood, the then office manager of Baggott & Morrison, have testified that these records were kept in the regular course of business, that they are correct, and that Mr. Rosee was at all times furnished with complete daily statements of his trading activities and of his ledger balances.

Mr. Rosee has insisted that Mr. Morrison produce all of Mr. Rosee's trading cards for the period covered by the ledger accounts. The Arbitration Committee has so ordered, but Mr. Morrison has not yet complied with that order.

Mr. Morrison stated his position with respect to production of the trading cards in a letter addressed to the Arbitration Committee under date of August 15, 1960. Mr. Rosee stated his position on the mat-

ter in a letter addressed to the Arbitration Committee under date of August 23, 1960.

There is no doubt that the Arbitration Committee had authority to order the production of these trading cards before the Committee. In a court of law the judge can, and does, by issuance of a subpoena, order the production, in open court, of documentary material pertinent to the litigation. The analogy is clear.

Mr. Rosee's letter of August 23, 1960, refers to the so-called "best evidence rule". It is true that there was a time when ledger accounts such as these would not have been admissible into evidence—only the trading cards would have been regarded as "books of original entry" and hence admissible. However, the complexities of modern business procedures have compelled substantial modification of this concept.

It is now generally held that an original entry, within the rule admitting in evidence books of account consisting of such entries, must have been made in the regular course of business, must (as a rule) have been part of a series, must be fairly contemporaneous with the items entered, and must be the first permanent record of the transactions recorded.

A review of pertinent Illinois decisions indicates that ledger accounts such as these are admissible, and that the trading cards constitute merely a source of verification for the entries, if the accuracy thereof is questioned.

We are informed that Mr. Rosee has not questioned the accuracy of any entry or entries in the ledger accounts. If that be true, then it is difficult to see what purpose the production of the trading cards can serve—other than to cause additional de-

lay in the determination of the issues before the Arbitration Committee.

We are further informed that Mr. Rosee has repeatedly demanded a general audit of his dealings with the firm of Baggott & Morrison. The present Arbitration Committee does not have authority, under the submission agreement heretofore signed by the parties, to conduct any such audit.

Please call if we can be of any further help in this situation.

Very truly yours,

Kirkland, Ellis, Hodson, Chaffetz & Masters

By

ACH:fem